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1 RECORD OF ORAL HEARING
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3 UNITED STATES PATENT AND TRADEMARK OFFICE
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5

6 BEFORE THE BOARD OF PATENT APPEALS
7 AND INTERFERENCES
8

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10 Ex parte GERALD H. ABLAN
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13 Appeal 2008-2405
14 Application 09/644,411
15 Technology Center 3600
16

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18 Oral Hearing Held: October 21, 2008
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22 Before LINDA E. HORNER, ANTON W. FETTING, and MICHAEL W.
23 O'NEILL, Administrative Patent Judges

24

25 ON BEHALF OF THE APPELLANT:

26

27 MICHAEL J. MEHRMAN, ESQUIRE
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33 The above-entitled matter came on for hearing on Tuesday, October
34 21, 2008, commencing at 2:10 p.m., at the U.S. Patent and Trademark
35 Office, 600 Dulany Street, Alexandria, Virginia, before Lori B. Allen,
36 Notary Public.

PROCEEDINGS

JUDGE HORNER: Good afternoon, Mr. Mehrman.

MR. MEHRMAN: Good afternoon.

JUDGE HORNER: Before we get started, if you have a business card
could give to the court reporter, I think she would appreciate that.

MR. MEHRMAN: And I have a couple of pieces of paper to help us, it's okay.

JUDGE HORNER: What exactly are they? Are they things that are record, or –

MR. MEHRMAN: Yes.

JUDGE HORNER: That is great. And just to let you know, we have . Phil Kaufman is here, observing. He is an employee here, at the l, and a patent attorney who works with me.

MR. MEHRMAN: Okay. Is Examiner Hewitt going to join us?

JUDGE HORNER: No, I do not believe so. It will just be you, Mr. *DeMille*.

MR. MEHRMAN: Okay. This is just the claims appendix, if -- and --

JUDGE HORNER: Thank you.

MR. MEHRMAN: This is a -- some excerpts from the specification, some pages from the record.

JUDGE HORNER: Thank you. Whenever you are ready, go ahead and start.

MR. MEHRMAN: Thank you for having me here today. What I'd like to do is just first explain what the invention is about, and then at the claim language.

1 And then we will look at the cited portions of the reference, and see --
2 what I think the problem is, is that the references don't show what they have
3 been cited to show. And we can take a look at the specific references and
4 what the references do show, specific citations.

5 The invention is an auction management system. It's a system that
6 people with a lot of products to sell at auctions like eBay, electronic
7 auctions, use to manage their -- power sellers. And there are three aspects of
8 the invention that are recited in the claims. One is an auction generating and
9 submission system. It's a menu-driven utility that has templates, that have
10 the format of what an auction will look like, places to put a photo, places to
11 put a description, places to put prices and other parameters, and to specify
12 where you want the auction to go, and when you want it to run, and -- the
13 auction parameters.

14 And the system works with some libraries that are set up to help the
15 people manage their auctions, and there is a template library of different
16 templates they can use, and there is a library of photos of products, a photo
17 library, and there is a place where they can store their descriptions so that
18 they can use these same elements over and over again to create different
19 auctions, and then specify them.

20 So if you've got hundreds and hundreds of items to sell, it allows you
21 a menu-driven way to point and click and create your auctions. And it also
22 stores the auction submissions themselves in the library, and stores the
23 billing information. So there is a front end, we call it, which is for creating
24 and submitting these auctions, and then it will -- you create your auction,
25 you specify where you want it to go -- multiple auctions often -- you hit the
26 button, and off they go.

1 Then, in the middle, is what we call the auction consolidation engine.
2 This is a system that goes out to the various auctions as they're ongoing,
3 parses data from the sites, brings them back, and gives you updates so that
4 you have a constant, or a continual update, of your various auctions. And
5 that piece is shown in Rackson, which is the main reference. Rackson has a
6 crawler, if you will, an auction crawler that goes out and brings the data
7 back. But it doesn't have the front end or the back end that I will describe
8 now.

9 The back end is a consolidated auction management report. It is a
10 way that the auction -- the seller or the buyer, the person using the system --
11 can view their auctions. It gives them a list of all their auctions, and updates
12 that information, presents it to them. They have multiple auctions on a
13 single page, and each one is represented by a line.

14 And the -- managing an auction requires post-sale activity. If you sell
15 some stuff, you want to give auction feedback, you want to make sure it's
16 been paid, you want to make sure the item has been shipped, and you want
17 to give whatever other items that you want to schedule to be done, and this
18 auction management report is especially tailored for the power seller. It's
19 got icons for each of the different items that the seller needs to keep track of,
20 post-sale items, and allows them to click on the item when they're done, and
21 indicate that they have been completed so you can see the status of the
22 auctions.

23 So, it's sort of a front-to-end auction management system. It has been
24 very successful. We have an affidavit/declaration in the record. It's a great
25 commercial success. People like -- power selling has, you know, taken off,

1 and the auction management system of this particular inventor has been well
2 received and successful.

3 Rackson is the primary reference. Rackson has a system in which it
4 goes out and monitors multiple sites, and brings the data back. But the
5 purpose of the monitoring system in Rackson is a little bit different. His
6 idea was to generate a -- figure out what an optimum bid price was for an
7 item. If you're trying to sell an item, his idea was if you look at similar
8 items being sold on multiple sites, you try and figure out what the optimum
9 bid price is.

10 In the context of trying to decide the optimum bid price, Mr. Rackson
11 did disclose a system that automatically goes out and collects auction data
12 and brings it back for analysis. So that portion of the reference really isn't at
13 issue.

14 If you take a look now at the claim's appendix, we can take a look at
15 what -- you know, how we have claimed what we have -- claim 67, the first
16 element I talk about, the menu-driven utility is recited in the first clause. It
17 talks about assembly auction submissions from pre-defined advertising
18 templates, images, et cetera.

19 Then the second -- the auction monitoring report is in the second
20 clause, it talks about the common view showing multiple records, and the
21 tracking field identifying the status of post-sale activities.

22 One other thing this site does is you can also program it to
23 automatically provide -- perform certain post-sale activities, like provide
24 feedback, and it will automatically do that and update the site to show that
25 that has automatically been done. We refer to that as settings data. You

1 have certain settings data that are pre-programmed that trigger the site to go
2 do this automatic post-sale activity.

3 And then, the auction consolidation engine is claimed in claim 67, and
4 it talks about going out, post the auctions, and then going out continually,
5 getting updated information, parsing that information, and then bringing it
6 back.

7 Now, claim 72, which has similar language to what's in claim 73,
8 which is an independent claim, claims the auction creation submission
9 engine -- or the front end, in more detail -- it talks about creating an
10 electronic library comprised of inventory records, creating an electronic
11 image library comprising images of the items, comprising a textural
12 description library of items, creating an electronic advertisement template
13 library to get the templates, and then you have a menu-driven user interface
14 to receive user commands creating the submissions, and receiving user
15 instructions through the interface to create the subject -- submissions for
16 selected item, and then going ahead and automatically creating the
17 submission, you know, based on -- using the menu-driven utility.

18 And claim 82 is an independent claim, the third independent claim,
19 which is directed to the back end, which has a little more detail about the
20 tracking fields and the way the tracking fields are used to monitor and
21 display the status of post-sale activity.

22 Now, if you will turn to the other document I have provided, what I
23 have done here is I have parsed out from the examiner's answer, which --
24 actually, the pages are behind that, if you want to see the specific examiner's
25 answer, pages that I am referring to, and I have pulled out the references --
26 or omitted, if you will -- the references to the auction consolidation engine

1 that is not at issue, and given you the bullet points where the examiner says
2 the auction creation and submission front end is shown -- that's in bullets
3 one and two in his answer on page three -- and then bullet number five is the
4 citations where he claims an auction monitoring report, as claimed in the
5 application shown.

6 And then, on page five, I put a little arrow where his reference to
7 Conklin is, and he claims that Conklin shows a tracking system with the --
8 for his reference for the auction tracking items. And you can see that behind
9 that are the figures that he also cites.

10 So, if you look just quickly at the first two, which are on pages six and
11 seven of the paper that I have marked in the bottom margin, those are the
12 pages he cites from Rackson for the auction submission engine. And you
13 see that those are general computer architecture diagrams that show that
14 there is a network system in which the auction is taking place. There is no
15 specific -- there is no auction template shown, or any system for using an
16 auction template. It's not shown in the figures.

17 His references are Rackson, at columns six through nine, which says
18 that the object of the invention is to provide increased visibility of an item to
19 be auctioned by mirroring the item to be offered through plurality of remote
20 auction services, simultaneously, where the services are computerized or
21 manually operated.

22 Well, that is not a citation to an auction menu-driven system for
23 creating auction submissions. And so, the only reference we have left that is
24 cited to show the submission engine is Rackson at column 9, 25 through 35,
25 which he cited twice.

1 And this is a sentence -- or that's actually two sentences -- it says,
2 "The seller or the multi-auction service may specify the selling parameters
3 of the offer to include, but not limited to, some or all of the following: a
4 start date and time; a closing date and time; reserve price; successful bid
5 range; quantity of items; item description." And, in addition to text,
6 "graphic representation, such as an image file, photograph, or file video clip
7 or other content that provides representation of the item. These parameters
8 may be defined by the seller, with the assistance of the multi-auction service,
9 or may be generated exclusively by the multi-auction service."

10 The second sentence is making reference to the sale price, where the
11 system is designed to come up with an optimum sale price. So, what
12 Rackson – this passage from Rackson – describes is the parameters that a
13 user may want to include in a bid submission. It has no suggestion or
14 teaching of pre-defined templates –

15 JUDGE HORNER: Why wouldn't the figure 12 be a pre-defined
16 template? Figure 12 of Rackson shows a user interface that has all these
17 empty spots where people can go in and put their bid parameters for putting
18 together a bid that includes things like that date, or ending date of the bid,
19 the condition of the article, the price or quantity required, et cetera.

20 MR. MEHRMAN: I will have to pull it up and -- I don't have figure
21 12 memorized. I do have a copy of figure 14, which I think is actually the
22 most relevant figure out of Rackson. Rackson, the auction report, or the
23 figure in Rackson that is included, is a report that shows some items and the
24 optimum bid calculation, but it doesn't have a template for -- a system of
25 templates for -- ultimately creating references.

1 I don't know if you have 12 handy; I can look it up, pull it up, in a
2 second.

3 JUDGE HORNER: Well, we have got it on our computer screens, so
4 we do not have a copy of it.

5 MR. MEHRMAN: But I have been over Rackson many times, and
6 there is no description in Rackson of a menu-driven utility of the type that is
7 claimed that allows users to store reusable resources for creating auctions,
8 and have a place to store their images, their descriptions, their templates,
9 their auction submission, and then have a menu-driven –

10 JUDGE FETTING: Do you have a copy of Rackson with you?

11 MR. MEHRMAN: I do. It's right -- it's on the –

12 JUDGE FETTING: Because column nine, first of all, indicates that
13 there is a library, because it is -- at least it would seem to -- because at the
14 top of that paragraph that you are citing it says that the computing devices
15 have memory that stores the parameters of the items to be auctioned, which
16 includes identification data for the sellers and bidders, selling rules, and --
17 well, storing parameters of, I guess, the auction.

18 It also includes a means for replicating the item to be auctioned. And,
19 of course, once you are replicating, that necessitates some form of a template
20 in order to be able to create a replica.

21 JUDGE HORNER: Or a library.

22 JUDGE FETTING: Or a library.

23 MR. MEHRMAN: Well, I think that --

24 JUDGE FETTING: So the fact that you have the storage implies the
25 library, because the storage is going to be indexed, and provides storage.
26 And the combination of those alone would constitute a library.

1 MR. MEHRMAN: Well, and there is a database shown –

2 JUDGE FETTING: Right.

3 MR. MEHRMAN: The reference, I believe in Rackson, it's talking
4 about replicating -- he is talking about taking the same item and selling it at
5 multiple -- posting it on multiple auctions.

6 JUDGE FETTING: Right.

7 MR. MEHRMAN: Which is certainly a function that is described. It
8 seems to me that is different than providing a system for creating the menu-
9 driven utility for creating the submissions themselves, in which you have got
10 a bunch of different templates you can select, and you can drop in your
11 photos and your predefined resources, and specify your parameters the way
12 you want to run, and go ahead and make your submission.

13 JUDGE FETTING: Well, it would seem that once you have the idea,
14 the teaching of a menu-driven interface, coupled with the description that
15 you are going to need to provide -- text graphics and audio for all of the
16 items to be submitted -- one of ordinary skill would recognize that the menu
17 is one of many vehicles, and probably the vehicle of choice, for actually
18 doing that.

19 I don't know that you necessarily need to have an explicit description
20 for something that is -- one of ordinary skill in the art would have learned in
21 his freshman year course.

22 MR. MEHRMAN: Well, I think there is a difference between an ad
23 hoc system for making auction submissions one at a time with parameters
24 that you -- in fact, it's the difference between not having an auction
25 submission system and having one.

1 You know, here, the inventor has gone through and created a system
2 that has the resources available so that a person selling a lot of items can
3 easily construct their submissions using pre-defined templates and their
4 stored resources, and provides them with a menu-driven system to do that.

5 Prior, we have a teaching like in Rackson or, you know, prior to the
6 power seller days, when you wanted to make an auction, you know, you
7 started from scratch and you decided what you wanted, and you built your
8 auctions one at a time -- your submissions one at a time -- and then you
9 submitted them. And the inventor here has a -- invented or claimed the
10 menu-driven utility with the attributes, you know, claimed, including these
11 pre-defined templates and places to store his -- you know, these different
12 resources. And, you know, that is one aspect of --

13 JUDGE FETTING: So --

14 MR. MEHRMAN: -- of his invention.

15 JUDGE FETTING: So you are suggesting that the invention is the
16 idea of using a menu to actually facilitate the selection of these items?

17 MR. MEHRMAN: A menu-driven auction creation and submission
18 engine that --

19 JUDGE FETTING: Well, clearly, Rackson has a menu creation and
20 submission engine, because it allows you to create and submit, multiple
21 times, items --

22 MR. MEHRMAN: Yes, and we will --

23 JUDGE FETTING: -- to multiple auctions.

24 MR. MEHRMAN: I mean, and I agree with you. It will submit --

25 JUDGE FETTING: Right.

1 MR. MEHRMAN: You can tell it to submit your auction submission
2 to multiple auctions. What it doesn't have is this menu-driven utility to help
3 you create the submissions with the --

4 JUDGE FETTING: Well, it does seem to have menus in figure 12. In
5 fact, it -- the -- column 24 says that it allows -- it may specify a format, the
6 multi-auction service may specify a format -- that's a template -- or supply
7 examples of rules that may be selected. It may -- the user may indicate a
8 position on a chart to automatically determine rules and strategies. That is
9 an example of a menu.

10 The -- it provides a calendar where the user may select a date. That is
11 a menu.

12 So, it clearly is suggesting the use of a menu. And, again -- and it also
13 suggests the type of data files that you are saying needs to be submitted.
14 Why would it not be within the skill of one of ordinary skill in the art to say
15 that if I have a suggestion for the menu, and a suggestion for what I have to
16 submit, I wouldn't use the menu or the submission?

17 MR. MEHRMAN: Well, I think there is a difference between a
18 generalized menu and a menu-driven system for creating auctions that have
19 pre-defined templates configured for your auction submissions, and places to
20 store the resources that you're going to drop in, and the figures, and the –

21 JUDGE HORNER: I keep hearing you say "places to store the
22 resources," but I do not see in claim 67 where it is requiring that, for
23 example, the product images or textual descriptions, or user-specified
24 auction parameters are stored in the library, or stored anywhere.

1 What I see is that claim 67 requires the actual auction submission to
2 be stored, not these things that you are -- images and things that you are
3 pulling to put in to different templates to create different submissions.

4 MR. MEHRMAN: That is in claim 72 and 73. Claim 72 is a
5 dependent claim, 67, and 73 has that further detail in an independent claim.

6 Let's talk about the back end. Can we do that? Or do you want --

7 JUDGE FETTING: Sure, that is fine.

8 MR. MEHRMAN: The back-end engine is, again, very useful to the
9 power seller. It has the multiple auctions shown in a single view, listed in
10 rows, and it's got the tracking items so that you can track. And he's got --
11 being able to provision, if you will, in advance for some of those post-sale
12 activities to be done automatically.

13 The examiner admits that Rackson doesn't show that. He gives us a
14 citation to Conklin. Conklin is on the second page there. It's not an auction
15 system. Conklin is a multi-variant negotiation engine in which -- it creates
16 common documents that multiple users can use.

17 And one of the things that Conklin talks about is that the use of these
18 common documents allows the activity of the users of the system to be
19 tracked, namely the negotiation activity, the -- you know, it tracks the
20 changes, if you will, that we're all familiar with now, the tracked changes --

21 JUDGE FETTING: Is it not fair to characterize an auction as a
22 negotiation?

23 MR. MEHRMAN: An auction is not a kind of negotiation in which
24 two parties interact through an extended discourse. But, rather, it's a
25 transaction where one party makes an offer through an auction system, and

1 then another party unseen, without interacting and with common documents
2 or anything like that, comes in and , you know, responds to the auction.

3 It's sort of a different way of doing a transaction, as opposed to we sit
4 down and negotiate, and work out documents, you know, the auction of -- a
5 streamlined way to get to a sale that is quite different from, you know, a
6 multi-variant, multi-document, multi-party negotiation.

7 You know, now Conklin does, of course, describe a system that keeps
8 track of different versions of documents, changes that people have made,
9 and it keeps track of certain activity. And if you look in the pages -- the
10 passage that I have cited, it refers to Conklin in the abstract, and in the fourth
11 line down, fifth line down, it does say "tracks activity." And then, in his
12 second citation, he has a reference where it says, "The multi-variant engine
13 keeps track of each set of changes, and can display them."

14 And there are some figures I have -- you know, the figures he cited I
15 put in the back there. You can see there, you know, general figures
16 describing this multi-variant engine. They don't have any -- you know, it
17 doesn't have any specific reference to -- or applicability to -- auction
18 monitoring. It doesn't have tracking items for post-sale activity associated
19 with tracking items. It doesn't talk about provisioning, some of these post-
20 sale activities to be automatically performed and then updating the report. It
21 doesn't have a single report in which multiple auction items are disclosed. It
22 doesn't work in connection with an auction consolidation engine that goes
23 out and parses information and then brings it back.

24 It is not -- I wouldn't -- I don't think it is particularly relevant to the
25 invention. But the examiner has cited, because it describes this tracking
26 function. So the general idea of tracking isn't what the claim, you know,

1 describes. The claim describes an auction monitoring report, in which you
2 have got multiple auctions represented in a single view, you've got these
3 tracking items that indicate the status of post-sale activity and the ability to
4 change, either automatically, in some cases, or manually, to indicate the
5 change in status so that you can manage and view -- see, manage, conduct
6 your auction business.

7 And it's not -- if you combined Conklin with Rackson, you wouldn't
8 have an auction monitoring report, tracking field. I don't know what you
9 would have. You would have some sort of a multi-variant, multi-document
10 combination with an auction system that is calculating optimum bids. You
11 know, the combination doesn't fit together, certainly not suggested in any
12 cogent way.

13 But it doesn't -- the elements of the invention, as claimed, just aren't
14 present in Conklin or Rackson. And when you combine them, you don't --
15 you know, it's not like one fills the gaps in the other. We really have sort of
16 a --

17 JUDGE FETTING: Well, Conklin specifically recites in column 14
18 that it does track activity.

19 MR. MEHRMAN: Tracks activity, yes. It certainly --

20 JUDGE FETTING: So, if you combine Conklin with Rackson, you
21 would be tracking the activity of an auction. And Conklin also says one
22 other aspect is that it provides handling for payment processing. And as the
23 examiner says, that -- Rackson also acknowledges the need to ship items
24 after the fact.

25 So, both of them acknowledge that there are post-sales activities.
26 And, given that Conklin uses a dynamic report to track the activities,

1 including post-sales activities, he is saying that it was known to use a
2 dynamic report to track post-sales activities. And since, clearly, Rackson
3 acknowledges that there are post-sale activities, why wouldn't you use a
4 known dynamic report to track that in Rackson?

5 MR. MEHRMAN: Well, I don't think --

6 JUDGE FETTING: See, to me, it just seems that he is saying there is
7 sort of this reporting concept called a "dynamic report," that tracks activity.
8 That can be used across a broad array of applications.

9 And clearly, Rackson, on its own face, would be an application that
10 would be amenable to that.

11 MR. MEHRMAN: Well, I don't think Mr. Ablan claims to have
12 invented dynamic reporting, or a database in which items can be updated.
13 And he certainly didn't invent multi-variant document tracking. What he did
14 invent is a specific system designed for the needs of auction power sellers
15 who have a lot of auctions to manage and submit and keep track of, and he
16 has invented a system that is specifically and very well tailored to the
17 auction professional, and provides him with what he needs at the front end,
18 and provides him with what he needs in the middle, provides him with what
19 he needs in the back end.

20 And that problem to be solved, that system of resources to be
21 provided to facilitate the business of the auction professional, is not the
22 problem that is trying to be solved by Rackson. It's not the problem that is
23 trying to be solved by Conklin. The combination of the specific things that
24 are claimed that provide these advantages to this particular -- to meet this
25 particular need aren't suggested in any of the references, and -- much less in
26 the combination.

1 There is no talk about provisioning the system to automatically
2 provide feedback, and then updating those things. There is no talk about
3 tracking items that are specifically related to post-sale activity associated
4 with auctions. There is no talk about providing a single view in which
5 multiple auctions -- the status -- the updated status of the auction, as well as
6 post-sale activities can be viewed in a common view for multiple auctions.
7 There is no talk about specific templates for auctions, and a system for
8 creating libraries for maintaining all those resources, and for keeping the
9 post-sale resources as well: the submissions themselves, the billing data, et
10 cetera.

11 It is a front-to-back system that solves the problems and needs and
12 provides a system tailored to this particular need that, prior to this invention
13 by Mr. Ablan, was not in the marketplace, had not been developed --

14 JUDGE HORNER: Is the basis for your commercial success
15 declaration the front-to-back solution, the fact that you have got a solution
16 that goes -- covers all these needs?

17 It was not clear to me from this declaration what the basis was,
18 because you point to the claimed invention. But, as you have noted, you
19 have got three independent claims that cover different parts of the system.
20 So what is the commercial success argument based on? Which claim --

21 MR. MEHRMAN: Well, it is --

22 JUDGE HORNER: -- are you describing?

23 MR. MEHRMAN: It is impossible to parse that question because the
24 claims to the -- all three parts, the entire system, was deployed together.
25 And so the system has had -- has now, and has had, since it was released --
26 these three elements, in combination.

1 And so, we can -- you know, we can confidently and, you know,
2 categorically say that the commercial success is due to the claimed
3 invention, because, you know, all of the invention is claimed, all of the
4 commercial -- all of the important parts of the commercial system are
5 disclosed in the application and claimed.

6 So, it is -- you know, I can't tell you -- we don't do focus groups or
7 anything, trying to find out, you know, which -- whether the front end was
8 more valuable than the back end. I can tell you that the combination of the
9 suite, if you will, of auction management techniques, including the auction
10 submission utility, the ongoing continual auction update, providing that
11 information and displaying it together, provides a very commercially
12 successful and desirable solution for the auction professional. And all of
13 that is claimed.

14 JUDGE FETTING: I was a little confused by the declaration, because
15 the declaration was apparently by Mr. Daris McCullough?

16 MR. MEHRMAN: Daris. And it was my error to identify him as the
17 inventor. I put that in there, and I apologize.

18 JUDGE FETTING: Oh, okay.

19 MR. MEHRMAN: That is incorrect.

20 JUDGE FETTING: That was my confusion.

21 MR. MEHRMAN: He is not -- Mr. Ablan was the sole inventor, and
22 Mr. McCullough joined the company after the invention had been complete,
23 and after it had been released. And he was a controller at the time.

24 And I -- that was my mistake. I left that in there from a previous
25 declaration that I -- I should have had this multi-variant system to help me.
26 But I did notice that, and I didn't think it was worth correcting. We can

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1 certainly correct the record now. And if there is an issue with that, I am
2 happy to take whatever corrective action.

3 But Daris is a fine fellow. He was a controller, and he had access to
4 the financial records. And the purpose of the declaration was to give me the
5 sales, and the -- this product is the only product the company sells, and they
6 don't have any other divisions, there isn't any commingling, there aren't any -
7 - you know, everything they did is this. This is the only source of their
8 success, is the claimed invention.

9 JUDGE HORNER: Any further questions?

10 JUDGE FETTING: No further questions.

11 JUDGE HORNER: Any questions?

12 JUDGE O'NEILL: No.

13 JUDGE HORNER: Okay. Thank you.

14 MR. MEHRMAN: Thank you.

15 (Whereupon, at approximately 2:45 p.m., the proceedings were concluded.)